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No. 853

In the Supreme Court of the United States

OCTOBER TERM, 1969

FEDERAL TRADE COMMISSION, PETITIONER

v.

COLUMBIA BROADCASTING SYSTEM, INC., AND COLUMBIA RECORD CLUB, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,
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Washington, D.C. 20530

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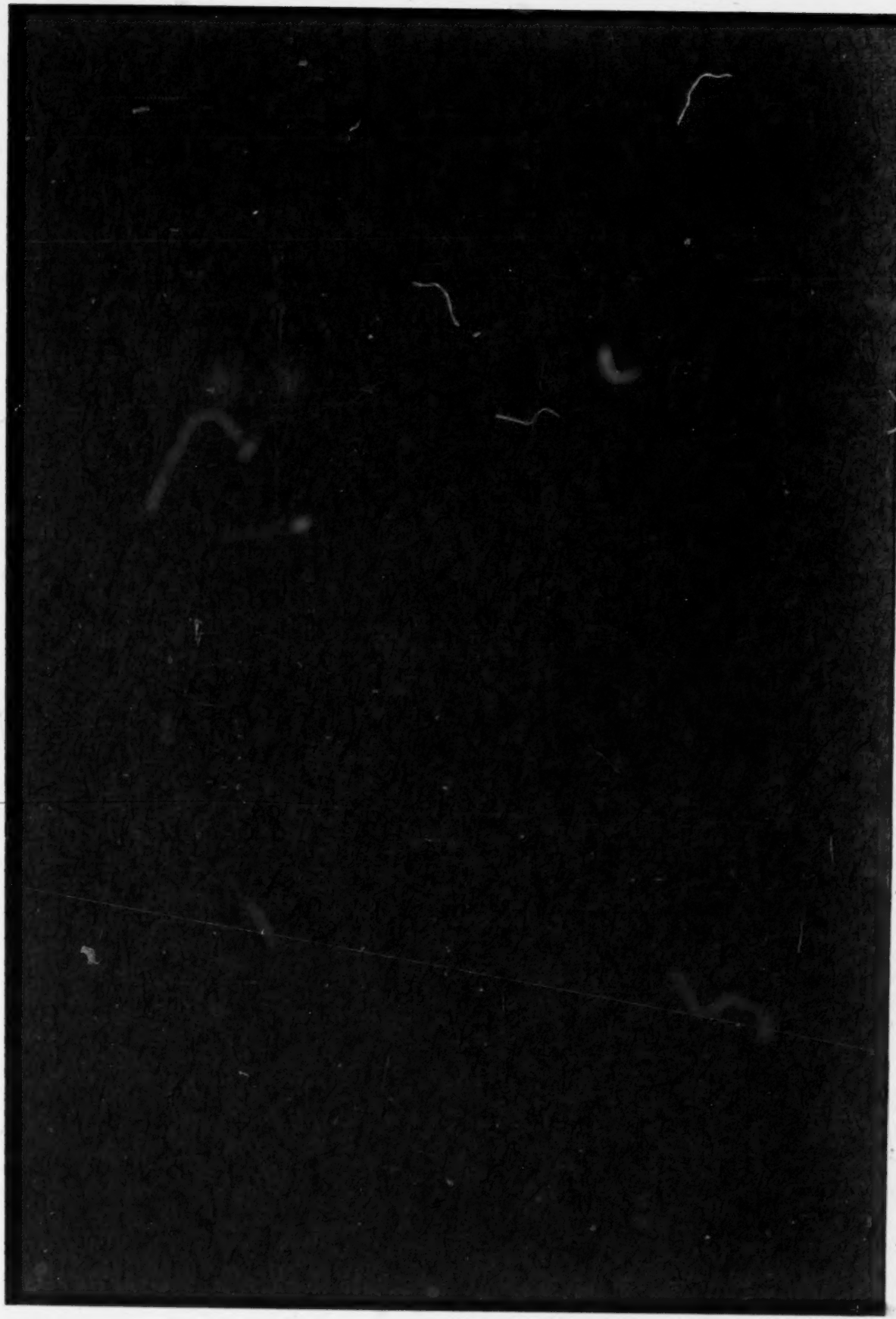
Washington, D.C. 20580



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In our petition we showed—as the dissenting judge observed—that the majority below approved the Commission's determination of the relevant market and its findings that respondents' license agreements foreclosed that market (Pet. 16a); and that the only reason the majority set aside the Commission's findings was its belief that substantial changes had occurred in the market since the evidence was taken. Describing the record on the basis of the Hearing Examiner's findings (Br. in Opp. p. 2, n.**) respondents nevertheless insist that the court really held that the Commission's findings were unsupported by the evidence

377-034—70

and the law. However, the Examiner's findings were rejected by the Commission, which made its own extensive findings and conclusions (R. 482–534); these of course are the only proper bases upon which to test the Commission's determination.

We see no reason to discuss further respondents' contentions on the merits. Respondents have, however, raised a new matter not discussed in the opinions below or in any previous filing in this case, and this warrants a brief reply. They charge that the Federal Trade Commission's complaint counsel suppressed evidence as to the structure of the market which was in their possession at the time the case was argued before the Commission, and urge that the petition be denied so that the Commission can explore this charge on the remand that the court of appeals ordered for other reasons.

1. Respondents base their charges of wrongdoing on a colloquy at the oral argument of May 13, 1965, between complaint counsel and Commissioner Elman. The Commissioner asked (R. 2099):

> What about these record clubs that sell you anything out of the Swan Record Club [sic] at something like 38 per cent off? Where do they get their records?

Except for matter relating to one club, the evidentiary record contains no data concerning such groups. Accordingly, complaint counsel, Mr. Needelman, responded to Commissioner Elman as follows (R. 2099):

> The record is barren about non-Big Three record clubs, and we don't know anything about them. The only record club that we know any-

> thing about besides the Big Three is the Diners Record Club. The Diners Record Club head testified that one of the reasons he went out of business is because of the operation of exclusivity. The Examiner made credibility findings on his testimony. And of course we are not asking the Commission to upset credibility findings.

Respondents now claim that complaint counsel had prior to the argument, and thus deliberately concealed from the Commission, knowledge of the alleged substantial market position achieved by the Record Club of America (RCOA); they charge that counsel's answer constituted both a suppression of evidence and a material misrepresentation of fact (Br. in Opp. pp. 16–20.

We submit that the petitioners have taken complaint counsel's statement out of context. The complete colloquy between Commissioner Elman and complaint counsel clearly shows that counsel's answer was addressed only to what the record showed (R. 2098–2100). The Commissioner's question was not an invitation for counsel to describe the structure of the record club market on the basis of facts which had not been developed in the evidentiary hearing, but was a query for record information, if any, about non-Big Three clubs which wanted to acquire recordings without getting the master disc from the manufacturer. Counsel, who could not properly answer on any basis other than the evidentiary record, responded with this understanding.

The manner in which this issue has been raised also demonstrates that it is baseless. Respondents' contention implies that they themselves knew nothing of

RCOA's market position at the time of the oral argument on May 13, 1965, and that consequently they were unable to address complaint counsel's answer to Commissioner Elman when their turn came to present oral argument. In view of the nature of this industry, it is incredible that respondents would be unaware of the entry of any significant new competitor which showed promise of gaining any significant market share at their expense. They must have been aware of any such charges because they keep close guard against any competitive threats (see *e.g.* R. 488–489). Respondents' silence on these matters at the oral argument strongly indicates that they understood complaint counsel's answer to be no more than a proper limitation of his argument to the record.

Indeed, respondents themselves opposed RCOA's effort to bring to the Commission's attention the very matters which they now claim were "suppressed." On February 16, 1967—some five months before the Commission's decision—RCOA filed a motion to intervene supported by an affidavit of RCOA's president, Mr. Friedman (R. 467, 468–469). The affidavit recited that the "Club has more than 700,000 members and during 1966 sales were approximately $8,000,000" (R. 468); it stated that Columbia and Capitol Records had foreclosed the supply of independent labels for record club use (*id.*). Both complaint counsel and respondents opposed RCOA's motion. Respondents argued (R. 472–477) that the motion and affidavit belatedly sought to inject into the case factual matters

which were wholly outside the record, which related only to developments subsequent to its closing, and which the Commission could not, therefore, properly consider. In addition, purporting to correct an alleged misstatement by RCOA to the effect that the predictions of complaint counsel had come true, respondents compared the very response they now call concealment with RCOA's claimed membership and sales. They concluded that such "belated efforts by outsiders to support the past 'predictions' of the so-called insiders is not likely to be productive or to advance the interests of justice in this matter" (R. 476–477). Thus, although fully informed of RCOA's claim of a large market share, respondents took the position that such matters could not properly be considered by the Commission.[1]

2. In the light of the foregoing we do not believe it is necessary for this Court to explore the factual basis for these charges in considering whether or not to grant the Commission's petition for certiorari. However, since the charges represent an attack on the professional integrity of the Commission's complaint counsel, we consider it appropriate to discuss the facts briefly.

The information allegedly withheld by complaint counsel is said to have been received by them at a meet-

[1] RCOA's motion was denied on the ground that the information submitted was largely cumulative. Noting trade press reports of RCOA's entry, but observing that neither side had offered to inform it of RCOA's competitive significance, the Commission assumed they were agreed that it had none (R. 530, n. 111).

ing with RCOA representatives before the oral argument to the Commission. It appears, however, that the meeting referred to occurred between October 18 and October 20, 1965, some five months after the oral argument. A copy of a memorandum of this meeting, dated October 20, 1965, signed by the three Commission attorneys who attended, is set out hereafter as Appendix A. The memorandum is corroborated by other documents and testimony. A contemporaneous memorandum from the files of the Department of Justice shows that Messrs. Markowitz and Friedman (the RCOA representatives) met with Department of Justice attorneys on October 18, 1965, to complain about respondents' conduct, but that after the nature of their complaint became clear they were referred to the Federal Trade Commission (App. B). A Department letter of July 17, 1969, reflects that this is the only Department record of such a meeting with RCOA personnel (App. C).

The evidentiary basis for respondents' contention that the meeting with Messrs. Markowitz and Friedman occurred before the oral argument is principally Mr. Markowitz' testimony at a deposition taken in another case (Br. in Opp. pp. 1a–12a). This testimony came almost five years after the alleged date of the meeting and was not based upon any specific records kept by Mr. Markowitz. It is pertinent that Mr. Markowitz did recall that they went to the Commission the same day that they called at the Department of Justice (Br. in

Opp. pp. 4a–5a).[2] He also testified that he had met with other Commission counsel (Br. in Opp. p. 12a), and Commission records show that on March 15, 1965, he came to Washington to discuss the unrelated matter of RCOA's advertising practices with the Commission's Bureau of Industry Guidance. It seems likely that Mr. Markowitz confused the two meetings when he testified after a five-year lapse.[3]

CONCLUSION

For the reasons stated in our petition and this reply memorandum, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHN V. BUFFINGTON,
General Counsel,
Federal Trade Commission.

FEBRUARY 1970.

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[2] The discrepancy in dates between the Department of Justice and FTC memoranda may be explained by the fact that the latter was drafted to refer to a meeting "on the above date," and was not finally typed and signed until two days later. However on the basis of the date on their memorandum Commission counsel believe that the meeting took place on October 20, 1965. Copies of the Commission memorandum and the Department's letter of July 17, 1969, were furnished to respondent's counsel three weeks prior to Mr. Markowitz' deposition.

[3] Two of the three Commission counsel who signed the memorandum of October 20 have offered affidavits as to their recollection of the October 1965 meeting with Messrs. Friedman and Markowitz. The third Commission attorney present, Miss Deanna Burger, has married and left the Commission, but also is willing to furnish an affidavit. In view of the discussion above, however, we see no reason to submit such testimonial matter to this Court.

APPENDIX A

United States Government Memorandum

To: File.

Date: October 20, 1965.

From: MORTON NEEDELMAN, RICHARD B. LAVINE, DEANNA BURGER, *Attorneys.*

Subject: CBS, Docket No. 8512.

On the above date Mr. Friedman, President of the Record Club of America, York, Pennsylvania, called upon Messrs. Needelman and Lavine in connection with certain practices of the record club affiliates of CBS, RCA and Capitol. The Record Club of America, which advertises in the Sunday *Times* among other papers, offers records at a reduced price after the initial membership fee is paid. Mr. Friedman was accompanied by his attorney, Mr. Markowitz. They had gone first to the Department of Justice and were referred to the Commission. Miss Burger was present during the discussion.

Mr. Friedman said his company had reached a critical point in its growth and that, at the present time, the inability to obtain products is detrimental to his company. He said that Columbia, RCA–Victor and Capitol sell to him at prices that are higher than those paid by the record club subsidiaries of each of those companies. In other words, the integrated record clubs have an enormous advantage in obtaining products from their parent—manufacturing arm.

Furthermore, he said that his most serious problem is the inability to buy records directly from *any* important record company because they are tied by ex-

clusive contract to one of the big three record clubs, precluding them from selling finished products or licensing masters to his company.

Mr. Markowitz wanted to know if the record in the Columbia Record Club matter could be reopened so that additional testimony of Mr. Friedman could be taken. Mr. Markowitz said that at the time of the hearings in the Columbia Record Club matter in 1963, this was not a critical problem to his client's company. One of the reasons that it had since become a problem is that following the release of the Initial Decision in that matter, all of the important record manufacturers have signed up with one of the three big record clubs. Mr. Markowitz stated flatly that he believes his client is adversely affected by the exclusivity provisions of the contracts between the independent record manufacturers and the big three record companies.

Messrs. Needelman and Lavine stated that the staff could not give advice in this respect, one way or another; that the matter was presently pending before the Commission and was out of the hands of the staff. Mr. Markowitz was told that he could, of course, take any steps he felt necessary to protect his client's interest, but that the staff could neither advise him nor participate with him in any respect. In short, it was the staff's intention neither to discourage nor encourage him.

Respectfully submitted.

(S) Morton Needelman
MORTON NEEDELMAN,
(S) Richard B. Lavine
RICHARD B. LAVINE,
(S) Deanna Burger
DEANNA BURGER,
Attorneys.

APPENDIX B

Cooper, Dobey, Mahaffie, Memler, Chrono, Hold Files

October 18, 1965.
File: 60–23–0.

CHARLES D. MAHAFFIE, JR.,
Assistant Chief,
General Litigation Section.

Columbia Record Club; Complaint of Record Club of America

On October 18 I conferred at my office with Mr. Sigmond Friedman, President and Mr. Lewis Markowitz, counsel for the Record Club of America. Record Club of America is engaged in the business of furnishing phonograph records to members through the use of catalogues, monthly magazines, etc. It is similar in operation to the Columbia, Capitol and RCA record clubs with the difference that it deals in all phonograph records available from any manufacturer and does not give its members a price reduction under that obtainable from regular retail sources. According to Markowitz, Record Club of America appeals to a higher class, more highly educated audience than that of the other record clubs. He states that there is little competitive overlap. Friedman states that his company now has over 300,000 members and is second only to Columbia in the record club business. Columbia has about 1.8 million members.

Markowitz and Friedman have two principal complaints. One, they complain that Record Club of

America is discriminated against by Columbia in that Columbia charges it the same price for records as it charges retail sellers. They claim that their company is more like a rack jobber than a retailer and should be entitled to a discount. This hurts them particularly since they are not competitive with the Columbia Record Club, a captive club. They say that they do obtain somewhat reduced prices from the other majors, including Capitol and RCA which have their own captive clubs. This is because Capitol and RCA sell through distributors, while Columbia has its own subsidiary distributing corporation.

Record Club of America's second complaint involves the exclusive licenses which Columbia obtains from other manufacturers for records to be distributed through its club. This practice makes it impossible for Record Club of America to obtain particular records from the independents so licensing Columbia.

I advised Messrs. Friedman and Markowitz that their first complaint involved the Robinson-Patman Act which we do not enforce and that I thought that their second complaint, that concerning licensing, would be pretty hard to make out under Section 1 of the Sherman Act. I told them that I thought their best course was to discuss this matter with the Federal Trade Commission, which has pending a case involving the Columbia Record Club and involving the practices of which they complain. I suggested that if they wished they could write a letter to the Antitrust Division stating forth their complaint and that in that event we would give it serious consideration, but I stated my expectation that we would refer their complaint to the Commission.

APPENDIX C

United States Department of Justice
Washington, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

RAH:GAC
60-23-0

July 17, 1969.

GERALD HARWOOD, *Esquire*
Federal Trade Commission
Washington, D.C. 20580

Re: Columbia Record Club

DEAR MR. HARWOOD:

Pursuant to our telephone conversation I confirm that a memorandum in our files records a meeting on October 18, 1965, between Messrs. Sigmond Friedman and Lewis Markowitz of the Record Club of America, and Charles D. Mahaffie, Jr., of the Antitrust Division. Our files do not reflect any other meetings with these gentlemen, or with anyone else from the Record Club of America.

Sincerely yours,

ROBERT A. HAMMOND III,
Acting Assistant Attorney General,
Antitrust Division.
(s) G. A. Connell,
By: GERALD A. CONNELL,
Assistant Chief,
General Litigation Section.

[Received July 18, 1969, Division of Litigation]

U.S. GOVERNMENT PRINTING OFFICE: 1970